



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**JUDICIAL REVIEW NO. 7 OF 2012**

**IN THE MATTER OF APPLICATION BY JACOB ATELA ING'ALA FOR LEAVE TO APPLY  
FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 261 LAWS OF KENYA**

**JOSEPH M'ING'ALA (DECEASED)**

**REPRESENTED BY JACOB ATELA INGA'LA.....EX-PARTE APPLICANT**

**VERSUS**

**THE DISTRICT LAND ADJUDICATION OFFICER TIGANIA EAST  
DISTRICT.....RESPONDENT**

**JULIUS MURIUKI KILIRU.....INTERESTED PARTY**

**J U D G M E N T**

1. The original application is dated 25th March, 2016 and seeks orders:-

***(1) THAT this Honourable Court be pleased to issue an order of certiorari to call up and bring into this Honourable Court for the purpose of being quashed the attached objection No. 692 affecting land parcel No. 8101 whose decision is dated 01/03/2012***

***(2) THAT an order of prohibition be issued to stop the Respondent from proceeding to implement order and decision on matter of objection no. 692 affecting land parcel No. 8101 Antuamburi Land Adjudication Section in the names of JOSEPH ING'ALA -DECEASED.***

***(3) That an order be issued to cancel any registration of any other person in respect of parcel No. 8101 Antumburi Adjudication Section in the names of Joseph Ing'ala deceased pursuant to objection No. 692.***

***(4) THAT the costs of this application be provided for.***

2. The Application was supported by the Affidavit Verifying the statement of facts and Statutory Statement of facts. It also has, inter alia, the following grounds:-

***(a) THAT this Honourable Court is therefore invited to intervene by way of Judicial Review to quash the proceedings and the awards entirely.***

**(b) THAT the District Land Adjudication Officer Tigania East District had no jurisdiction to order the Interested party to get land parcel No. 8101 in objection No. 692 Antumburi Adjudication Section.**

**(c) The Interested Party had no locus stand (sic) to bring the objection herein and the respondent had no jurisdiction to hear the objections having failed to comply with part 111 of Cap 284 in respect of “ascertainment of interests in land”**

**(d) The affidavit verifying the facts sworn by the ex-parte applicant JACOB ATELA ANGA'LA annexed hereto, the nature of this case and other reasons as will be adduced at the hearing hereof.**

**(e) THAT the respondent had no basis in law to allow objection No. 692 and dismiss objection 691.**

3. With leave of Court an amended Notice of Motion application dated 11th May, 2012 to indicate that the Exparte Applicant, represented Joseph M'Ingala ( deceased) was filed.

4. The Verifying Affidavit concerning the Amended Notice of Motion which was sworn on 11th May states as follows:-

*“I, JACOB ATELA ING'ALA adult male of KATHARENE sub-Location, MUTHARA Location, P.O Box 323-60200 MERU in the Republic of Kenya, do hereby make oath and solemnly swear as follows:-*

**1. THAT I was the Ex-parte Applicant is (sic) representative in the Respondent's proceedings produced hereafter and I am competent to swear this verifying affidavit in support of the application for leave herein.**

**2. That I am the son of Joseph M'Inga'la the deceased, and who is named as the Defendant in the Respondent's Proceedings.**

**3. THAT the Respondent's hand written proceedings, findings and decision from objection No. 691 and 692 to P/No's 611 and 8101, respectively , are produced as my exhibit marked J.A -1.**

**4. THAT I have typed the respondent's exhibit marked J.A -1 to the best of my knowledge for the ease of reference and reading which I also produce as my exhibit marked J.A-2.**

**5. THAT per the record of the Existing Rights P/No. 611 measuring 3.68 acres before demarcation and rename P/No. 611 of 3.42 acre in the Adjudication Register per my exhibit J.M -3 herein.**

**6. On 16/02/2012, the L.A.O erred in fact and in law when he persuaded me to be a representative of the defendant/my father in the Respondent's proceedings since my father died in the year 2009 and I have no Letters of Administration for his estate.**

**7. The Respondent failed to state in this proceedings and the whether (sic) he heard objections No. s 691 & 692 as objection to Record of the Existing Rights or as objections to Adjudication to whose procedure are different and under different section which confirms that he did not know the law he applied in his decision.**

**8. The Respondent heard and determined alleged objections No. 691 and 692 without specifying whether they are objections to Record of the Existing Rights and/or to the Adjudication Register and also without indicating whether they are Land Adjudication under Cap 283 or under Cap 284.**

9. ***THAT the Interested Party alleged that the land belonged to “ Our grandfather” and he is entitled to the land at Antuamburi and another Land at Muthara, Land Adjudication Sections.***

10. ***THAT the Interested Party's evidence did not establish the alleged common grandfather or that his father, who is not named in the proceedings was a brother to my father.***

11. ***The evidence of the Interested Party in the cross-examination failed to state the name of the alleged brother despite that objection No's 691 and 692 were allegedly referenced by L.A.O from a letter of objection which was not recorded in the proceedings.***

12. ***THAT the Interested Party failed to call any witnesses and establish he was a member of his uncle's family, notwithstanding that his brothers were present in the proceedings.***

13. ***THAT the Respondent was given evidence by land (sic) the Adjudication Committee outside the hearing proceedings and that in his findings, he says that the Committee intimated to me that the disputant (sic) are of the same family which is irregular and unprocedural.***

14. ***That the allegation by the Respondent that the Defendant in his proceedings was denying a family relationship is without basis and a sign of bias because he has failed to analyze evidence of the Ex-parte Applicant on family lineage.***

15. ***THAT upon my request, the Respondent refused to supply me with certified copies of the Interested Party's letters of objections under reference No. 691 and 692 as per my exhibit marked J.A -4.***

16. ***THAT the Respondent's finding is biased, supposition, speculation and hypothetical reasoning geared to assist the Interested Party.***

17. ***THAT objection procedure to land disputes on gathering are (sic) prescribed under section 16-18 of Cap 283 and objection to Adjudication Register is under section 25-26 of Cap 283.***

18. ***THAT the attempt by the Respondent to excuse the failure of the Interested Party to file a Committee case because of trust is clearly flawed and on (sic) attempt to assist the Interested Party.***

19. ***The Respondent's findings on page 8,9 & 10 that the Interested Party did not file a Committee case was enough for him to dismiss Interested Party objections.***

20. ***THAT the findings and the decision of the Respondent are so flawed and outrageous that no reasonable, fair and unbiased tribunal would arrive at the same decision.***

21. ***THAT the following findings made by the L.A.O are not based on the adduced evidence by the parties in the proceedings:-***

***i. Both Ex-parte applicant and the Interested Party in their statements of evidence did not refer to parcel No. s 611 and 8101 which are subject of the Respondent (sic) proceedings.***

***ii. The Ex-Parte Applicant's land allegedly located at Muthara Adjudication Section, Under quote “in the area known as Nduruma” are not found in the proceedings. The word “Nduruma” is not in the proceedings.***

***iii. The alleged common grandfather stated in the respondent's findings is not known by the parties herein or established by the parties evidence.***

***iv. The basis and the particulars of the letters of objection by the interested Party on which the respondent gave reference objection No's 691 & 692 is not referred to in the***

**Respondent's proceedings and findings.**

**v. No particulars of land located at Muthara Adjudication Section is referred to.**

**22. THAT this Honorable Court ought to call and quash the decision on objection No. 692 affecting parcel No. 8101 is hereby allowed (sic) The parcel is awarded to JULIUS MURIUKI KILIRU of 2.42 acres of the Land Adjudication Officer (sic) dated 1st March, 2012.**

**23. On 20/04/2012 , I confirmed that Antuamburi Land Adjudication Section in Tigania District Area, land ascertainment of right and interest, demarcation and consolidation and registration of title deeds and other purposes connected therewith is carried out under Land consolidation Act Cap 283, L.O.K per exhibit marked J.A -5 a & b legal notice of 1959.**

**24. THAT what is deponed herein is true and within my personal knowledge except where otherwise stated.**

5. The Interested Party's Replying Affidavit sworn on 29th January, 2013 states as follows:-

**“ I, JULIUS MURIUKI KILIRU, an adult male of sound mind resident in MERU COUNTY and of P.O Box 1077 MERU in the Republic of Kenya do hereby make oath and swear as follows:-**

**(1) THAT I am the Interested party herein sufficiently versed with all the matters stated herein and hence competent to swear this affidavit.**

**(2) THAT I have carefully read the amended notice of motion dated 11th may 2012 and it is in reply thereto that I swear this affidavit.**

**(3) THAT I am advised by my Advocates that the amended notice of motion dated 11th May 2012 is incurably defective, lacks merit, is a total abuse of the judicial process, and the same should be dismissed with costs.**

**(4) THAT I am further advised by my advocate that the objection proceedings were carried out procedurally and in accordance with the relevant law and the respondent had jurisdiction to handle the objection and he did the objection with his powers and the laid down law.**

**(5) THAT I am further advised by my advocates that the ex parte applicant is seeking an appeal of the decision of the respondent through the back door.**

**(6) THAT there was no error of fact on the part of the respondent as the evidence in the objection proceedings clearly showed that myself and the ex parte applicant were related and the land belonged to our common grandfather and I was therefore entitled to land from the ex parte applicant.**

**(7) THAT my brothers were present because they also want land from the exparte applicant but I was their representative.**

**(8) THAT the findings and decision of the respondent are fair and just as the ex-parte applicant wants to take away our land.**

**(9) THAT JOSEPH M'INGALA was properly represented at the hearing by his son JACOB ATELA INGALA as per the Kimeru customary law which was applicable in the hearings.**

**(10) THAT I depose (sic) to the foregoing believing the same to be true and accurate to the best of my knowledge , belief and understanding**

6. The Submissions proffered by the Exparte Applicant and by the Interested Party are more or less in congruence with what is contained in their affidavits.

7. The Exparte Applicant frames what he deems to be the issues for determination as:

**(1) Whether the respondent proceeded to hear the dispute without jurisdiction contrary to Section 26 (1) of Cap 281 of the Laws of Kenya.**

**(2) Whether the decision was arbitrary, biased and unreasonable.**

**(3) Whether the decision of the respondent dated 1st March, 2012 should be quashed.**

8. The Exparte Applicant submits that the respondent was so biased and arbitrary in his conduct that no reasonable tribunal would have come to the conclusion he arrived at for the following reasons (quoted verbatim).

*a) On page one (1) of the typed proceedings JA. 2 the defendant Joseph M'Ing'ala is deceased. A dispute cannot be filed against a deceased person unless there is a grant of Representation. It is a serious irregularity for the Respondent to hear a dispute without grant of Representation filed and granted in succession proceedings.*

*b) On page 9 of the typed proceedings A it is shown that "Parcel No. 611 measures one acre (1) and it is demarcated in sheet No. 37 and parcel No. 8101 is 2.42 acres and demarcated in Sheet No. 51 . It follows that Joseph M' Ing'ala deceased owned 3.42 acres and the land could not be placed in one location. The evidence of the Respondent in pages 1 & 2 is to the effect that the relationship is alleged to go for 7 generations too far and remote to establish any reasonable claim. Despite any lack of credible evidence the Respondent chose to believe the Interested Party which is a clear evidence of bias and totally unreasonable.*

*c) At the time of hearing when the ex-parte applicant gave evidence, the Interested Party ( on page 7 of the typed proceeding) asked only one question and the committee and the Land Adjudication Officer did not ask any questions. It follows they were satisfied with the explanation of the Ex-Parte Applicant. The findings of the Land Adjudication Officer on page 8 of the typed proceedings are without any credible evidentiary basis and lead to the conclusion that evidence of bias was and or used decision (sic) was motivated by extraneous consideration. The conclusion of bias is strengthened by the fact that the interested party did not adduce any independent evidence of common ancestry for 7 generations. It is doubtful that there is such evidence available and this shows further that the findings of the Respondent where so unreasonable that no tribunal without bias would come to such a conclusion.*

*d) But the most surprising finding is found on page 11 of the typed proceedings that "the Plaintiff will get a fairly bigger portion of the land at Antuamburi Adjudication section because the Defendant took the land at Muthara". There is no evidence of any land owned by the Defendant at Muthara except what the respondent said. If there is such a land the Respondent or the Interested Party should have given a folio number for it. Failure to do so shows that there is no such land and strengthens the Ex-parte's contention that the Respondent was biased and or compromised to such an extent as to act so unreasonably without any evidence.*

9. The Exparte Applicant submits that the procedure apposite to settlement of land disputes in areas under adjudication is set in Sections 16 to 18 of Cap 283 Laws of Kenya. He submits that:-

*i. Section 16 deals with Notice of Completion of Record of Existing Rights.*

*ii. Section 17 deals with objections to record of Existing Rights.*

*iii. Section 18 elaborates upon the Procedure apposite to objections.*

The Exparte Applicant asserts that these sections are set out in mandatory terms and submits that since the Interested Party did not comply with the mandatory terms, he could not consequently move to file an Objection to the Adjudication Register.

10. The Exparte Applicant opines that in accepting the claim that Joseph M'Inga'lia (deceased) had promised to give land to the Interested Party, the Respondent clearly demonstrated that he was biased and had set out, ab initio, to assist the Interested Party.

11. The Exparte Applicant has proffered the case of PETER OKECH KADAMAS VERSUS MUNICIPAL COUNCIL OF KISUMU – CIVIL APPEAL NO. 109 OF 1984 to buttress his assertion that the Presiding Judges of Appeal (Hancox, Nyarangi and Platt (JJA's) held that an order of prohibition will be granted to a person whose individual rights have been affected by a wrong decision.

12. The Exparte Applicant opines that it is trite law that Judicial Review applications are not concerned with the merits of the challenged decision but with the integrity of the decision making process. He says that as the Respondent flouted the law during the conduct of the proceedings, his decision should not be allowed to stand. The Exparte Applicant proffers the case of JOHN FIRZGERALD KENNEDY OMANGA VERSUS THE POSTMASTER GENERAL POSTAL CORPORATION OF KENYA -NAIROBI HIGH COURT MISCELLANEOUS APPEAL NUMBER 997 OF 2003.

13. The Exparte Applicant concludes that for the reasons he has adduced the 1st Respondent's decision dated 1st March, 2012 should be quashed and an Order of Prohibition be issued to stop the Respondent from proceeding to implement the order and decision made in Objection 692 affecting Land Parcel No. 8101.

14. The Respondent says that the decision sought to be prohibited was made way back in 2012 and can, therefore, not be prohibited. He proffers the case of KENYA NATIONAL EXAMINATIONS COUNCIL VERSUS REPUBLIC EX-PARTE GEOFFREY GATHERU NJOROGE AND 9 OTHERS- CIVIL APPEAL NO. 226 OF 1997 to buttress his assertion.

15. The Respondent submits that prayer 3 (a) in the amended Notice of Motion is alien to Judicial Review proceedings as Judicial Review only deals with the prerogative orders of mandamus, certiorari and prohibition.

16. The Respondent submits that Judicial Review is not concerned with the merits of the decision being challenged but with the integrity of the decision making process. He argues that in asking the Court to examine that locus of the Interested Party in the Objection proceedings, the Exparte Applicant is moving to the realm of the merit of the decision made. To buttress this assertion, the Respondent proffers the Court of Appeal case of THE COMMISSIONER OF LANDS VERSUS KUNSTE HOTEL LIMITED- CIVIL APPEAL NO. 234 OF 1995 where the Court held:

***“Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process.....the purpose of Judicial Review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the Court”.***

17. The Respondent submits that Judicial Review Orders are discretionary and as an authority he refers the Court to HALSBURY LAWS OF ENGLAND, 4TH EDITION, VOLUME 11 WHERE AT PAGE 805 PARAGRAPH 1508 it is written:-

***“.....the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the Circumstances obtaining and the discretion of the Court being a judicial one must be exercised on the evidence of sound legal principles”.***

18. The Respondent submits that in exercising its discretion the Court can withhold the gravity of the

sought order where among other reasons there has been delay in challenging the decision and where a public body has done all that it can be expected to do to fulfill its duty or where the path has been strewn with blockage or where it could cause administrative chaos and public inconvenience or where the object for which the application is made has already been realized. Outrightly, I opine that the Respondent has not bothered to elaborate how the reasons he has elaborated are either singularly or all of them applicable in the Circumstances of this application.

19. The Respondent has concluded by saying that he exercised diligence in hearing the apposite objection proceedings, properly applied his mind in the matter and complied with the Rules of Natural Justice. He says that the prerogative orders sought are not merited and urges the Court to withhold its discretion and dismiss the application.

20. The Respondent had filed Grounds of opposition dated 16th September, 2013, which upon careful consideration, I find that they are subsumed by the Submissions he proffered.

21. The Interested Party submits that the scope of Judicial Review is about the decision making process as opposed to the merits of the decision. He says that for all intents and purposes, this application amounts to an appeal against the decision of to the 1st Respondent. He tells the Court that the application is not confined to the decision making process but veers to the correctness of the apposite decision on matters of both law and fact. For this reason, the Interested Party says that the application must be dismissed with costs.

22. The Interested Party submits that the issues for determination as framed by the Exparte Applicant show that the application is an appeal. These issues are:-

***i. whether the respondent had jurisdiction to hear the matter.***

***ii. Whether the decision was arbitrary, biased and unreasonable.***

***iii. Whether the decision should be quashed.***

24. The Interested Party submits that the Exparte Applicant has failed to provide grounds to support the issues he has framed. He also submits that the Interested Party has not demonstrated how the 1st Respondent lacks jurisdiction or supported the other issues he has framed.

25. The Interested Party submits that proceedings under Section 20 of CAP 284, Laws of Kenya should be carried out in accordance with the Customary law relevant to the community. He argues that issues like letters of Administration are clearly alien to Customary law.

26. The Interested Party concludes his Submissions by asserting that the proceedings of the 1st Respondent were regular and that he had jurisdiction to adjudicate upon the matters raised in the apposite Objection. He says that the respondent “ was as much entitled to decide those matters wrongly as it was entitled to decide them rightly”. In support of this assertion, the Interested Party proffers the Case of *KENYA PIPELINE COMPANY LIMITED VERUS HYOSUNG EBARA COMPANY LIMITED AND 2 OTHERS [2012] e KLR*. The Interested Party tells the Court that this case was cited with approval by the Hon. Justice Weldon Korir, J in Nairobi *HCCC JUDICIAL REVIEW 216 OF 2012 -REPUBLIC VERUS PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD (RESPONDENT) AND CATERING LEVY TRUSTEES (1ST INTERESTED PARTY) AND BASELINE ARCHITECTS LIMITED (2ND INTERESTED PARTY)(eKLR)*.

27. For the reasons he has adduced , the Interested Party opines that this application lacks merit and should be dismissed with costs.

28. I have carefully considered the pleadings, the Submissions and the authorities proffered by the parties.

29. The authorities proffered by the parties constitute proper precedents and good law in their

circumstances, and this Court may use them if it finds that the circumstances of this case are congruent with those obtaining in authorities proffered by the parties.

30. All the parties in this matter agree that Judicial Review is concerned with the integrity of the process rather than the merits of the challenged decision.

31. It is universally accepted that tenability of Judicial Review is predicated upon the following grounds, though I do not claim that they are exhaustive:-

***i. illegality – This encompasses situations where the decision is made by the wrong person, where there is an error of law or fact, where the opposite decision is ultravires, where relevant considerations are ignored or where irrelevant considerations are taken into account and where discretion is fettered or for any other reason abused.***

***ii. Irrationality-- This encompasses where upon examination of all relevant factors and circumstances, the decision arrived at bears no proportionality or relevance to the facts and circumstances of the case. In other words, the decision made is merely dropped down from unexplainable and inapplicable sources. Such a decision is veritably subjective.***

***iii. Procedural infractions- These mainly concern breach of clearly available statutory provisions.***

***iv. Non- obedience to the principles of Natural Justice-This encompasses the rule against bias, the right to a fair hearing, the duty to give reasons and legitimate expectation.***

32. From the above discourse, I do not agree with the Submissions of the Respondent which suggest that once there is a fair hearing, to him meaning that the complainant has been listened to, then any attempt to challenge other matters such as jurisdiction, illegality, proportionality etc should be dismissed on account that the Court will be delving into the realm of merits of the decision rather than the procedural integrity of the decision. Indeed, there can be no fairness where, for example, statutory provisions are ignored.

33. I also do not agree with the Submission by the Interested Party that so long as the proceedings conducted by the 1st respondent were regular and he had jurisdiction to adjudicate upon the matter raised, he was entitled to wrongly or rightly decide the case before him. I do not agree with this casual approach which may encourage public bodies and officers to abuse their offices. For jurisdiction, it must be predicated upon the law. It cannot be contrived. The Supreme Court of Kenya pronounced itself eruditely in this regard in the case of Samuel Kamau Macharia and Another Versus KCB and 2 others (Petition No. 2 of 2011). The Court opined as follows:-

***“A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other Written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”.***

34. I opine that there can never be any regularity in the decision making process where there has been illegality, irrationality, procedural Impropriety and breach of the principles of Natural Justice.

35. The intimation by the Exparte Applicant that the impugned decision emanated from an objection considered under the Land Consolidation Act has not been controverted or even challenged.

36. The respondent does not show that a Committee had through its Chairman issued a Notice of Completion of Record of Existing Rights. He does not dispute the Exparte Applicant's claim that the Interested Party was named or was affected by part 1 of the Record of Existing Rights. Even assuming that this was the case, it is clear from the record of the Objection proceedings, that the objection was being heard way beyond the period of the 60 days provided for by section 17 of the Land Consolidation Act.

37. The sucker punch is spawned by procedural impropriety. Under Section 18 (2) any objection referred to a Committee under Section 18 (1) shall be considered by the Committee and the Committee shall make a finding thereon and every such finding shall be submitted to the Adjudication Officer. During the consideration of an Objection by a Committee the Adjudication Officer's role is zilch. He has no jurisdiction to enter the fray at this stage. Later on, he may handle the matter with the assistance of the Arbitration Board. This clearly evinces procedural impropriety. As Lord Diplock opined in Council of Civil Service Unions Versus Minister for Civil Service [1985] AC 374, the decision-maker "Must understand correctly the law that regulates his decision making power and give effect to it".

38. I opine that the Adjudication Officer may have conflated his role under Section 18 of the Land Consolidation Act with his role under Section 26 of the Land Adjudication Act.

39. Having carefully gone through the objection proceedings, I agree that what is contained in the proceedings does not support the decision reached by the Adjudication Officer. There is lack of proportionality and rationality. By saying this, I am not delving into mere consideration of the merits of the decision. A decision must have basis. Where there is no basis, there is no fair hearing. This then becomes the province and realm of Judicial Review.

40. From the foregoing it is clear that through breach of statutory provisions, the Adjudication Officer rendered his decision making process amenable to grant of Judicial Review Orders. I agree with the Exparte Applicant that bias, irrationality and unreasonableness permeate through the decision making process.

41. The decision made by the Land Adjudication Officer, Tigania East District, on 1st March, 2012, merits quashing.

42. I do not agree with the Respondent that there is nothing to be prohibited. An order of stay of implementation of the impugned decision was issued on 15th March, 2012. This means that the decision remains unimplemented unless if the respondent has acted in contempt of Court.

43. In the Circumstances, the decision of the Land Adjudication Officer, Tigania East District, made on 1st March, 2012 is called to this Court and is hereby quashed.

44. An Order of prohibition is issued to the Land Adjudication Officer, Tigania East District, prohibiting him from proceeding to implement his order made on 1st March, 2012 in objection No. 692 affecting land parcel No.8101.

45. Costs are awarded to the Exparte Applicant.

46. It is so ordered.

**DELIVERED IN OPEN COURT AT MERU THIS 30TH DAY OF NOVEMBER, 2016 IN THE PRESENCE OF:.**

CC: Daniel/James

Gatari Ringera for the Exparte -Applicant

Kiongo for the Respondent

**P.M. NJOROGE**

**JUDGE**